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No. 09-381

Supreme Court, U.S.
FILED
NOV 5 - 2009
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2009

JAMES CONSTANT

Petitioner,

v.

Superior Court of the State of California, County of San Bernardino, S-35, Case No. SCVSS 096961

Court of Appeal of the State of California, 4th District Div 2 Consolidated Cases EO44802 and EO45320

Supreme Court of California Case S173448

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and Through the Department of Transportation, Real Party in Interest

Respondents.

REPLY TO BRIEF IN OPPOSITION

James Constant, pro per
1603 Danbury Dr,
Claremont, CA 91711
909 624 1801
Constantrcs@cs.com

5765Q6

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REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

Can state quick action laws deprive property owners of their 5th Amendment right for just compensation and due process, and of their 14th Amendment right to equal treatment? The Brief in Opposition filed by Respondent The People of the State of California, acting by and Through the Department of Transportation ("State" hereafter) does nothing to address these three fundamental and elementary questions. Rather, the State's brief confuses the issues, by arguing that the appeal court's opinion, fully reproduced as an Appendix to State's brief, is correct under *California laws*. There is nothing in the State's brief that addresses the questions presented in the petition and demonstrates, by argument or authority, that California's quick action laws are neutral laws which conform with the 5th and 14th Amendments. This reply will correct the ill conceived notion that California's quick action laws conform with the Constitution.

THE COURT'S BELOW ADOPTION OF A QUICK ACTION LEGISLATIVE SCHEME WHICH ELIMINATES CONSTITUTIONAL RIGHTS AND REPLACES THEM WITH NON NEUTRAL STATUTORY RIGHTS VIOLATES THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the petition, petitioner contends the decisions below are repugnant to the California and Federal Constitutions, first, because they condemn private property without providing pre deprivation independent appraisal valuation and payment before taking private property and without making adjustments for rapid increases in land values and delay in payment after taking private property, second, because without a valid policy reason they create a disparity between the State and property owners (State takes private property now and pays later after all appeals have been exhausted, property owners face heavy costs of protracted litigation), and, third, because they do not provide pre deprivation discovery that would enable owners to prepare their defenses to the taking. Further, the court's below refusal to hear petitioner's constitutional claims (App. in Pet. for Cert. page 9 fn 1 last sentence and pages 41-43) and sole use of non neutral state laws in Cases E044802 and E045320 are examples of court discretions and laws that conflict with and stand as obstacles to the accomplishment and objectives of just compensation. The propriety of JNOV in eminent domain actions, the preclusion of petitioner's testimony and evidence as a landowner, and the apportionment of the JNOV award between the petitioner and State are examples of trial court decisions in conflict with federal laws. And, the evidence supporting the greatly increased value of the subject property at the time of trial in 2007, five years after the condemnation action started in 2002, is overlooked. California's waive to play statutes (§1255.410 deposit, §1268.310 interest, and §1255.260 waiver) which give the landowner a choice either to take a deposit and interest or litigate by waiving all constitutional rights except the right to

just compensation are more examples of trial court decisions in conflict with federal laws. The State's opposition brief simply contends that decisions by the courts below under the quick action legislative scheme are correct and, therefore, are constitutional. No effort is made to address conflicts between state and federal laws including the federal Constitution.

The courts below determined that the quick action legislative scheme can replace constitutionally protected rights with statutory rights that mimic constitutional rights and that this can be accomplished without effecting a taking, just compensation and equal treatment of property owners. The sole justification for the elimination of constitutionally protected rights is California Code of Civil Procedure §1263.110 *et seq.*[1] The courts below simply conclude without any detailed analysis about potential conflicts with federal laws that replacing constitutional rights for statutory rights is constitutional. *See* App. In Pet. for Cert. 23,37,47,51. According to California's quick action process property owners are denied pre deprivation discovery, appraisal valuation and payment, and their property is taken on a take now and pay later basis after all appeals have been exhausted. Property owners are asked to waive to play by giving up all constitutional rights except the right to challenge the value of their land which courts take as the only appropriate remedy for the state's eminent domain action.[2] Owners are

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[1] Available on line at http://www.leginfo.ca.gov/calaw.html

[2] Government cannot condition the right to just compensation on condition that owners waive their pre and post deprivation rights to defend the taking of their property. Owners who do not consent to waive their 5th and 14th Amendment rights must still retain their full fundamental right to defend the taking of their property at trial. *See* Perry

precluded from testifying and presenting evidence of value of their land and courts overrule non waived jury verdicts, make no adjustments for rapid increase in land values and for delay in payment, split JNOV awards with the State, and refuse to hear 5th and 14th Amendment claims relating to eminent domain takings, all under color of quick action state statutory provisions. Welcome to California's "statutory constitution" which makes takings, just compensation and equal treatment depend on state statutory provisions which change at the whim and will of legislative acts and judicial discretions.

It is impossible for a statute to replace constitutional rights by statutory rights. Constitutional rights exist as a matter of constitutional law - not statutory law - and are protected by the Constitution itself. **Cooper v. Aaron, 358 U.S. 1, 1.7-19 (1958)** (holding constitutional rights cannot be nullified by action of state legislator, executive, or judicial officer);. **Davis v. Wechsler, 263 US 22,24 (1923)** (Local rules or procedures must not discriminate against the federal law or affect the availability of a federal right); **Seaboard Air Line Ry. v. US (1923) 261 US 299, 304** (Petitioner's just compensation cannot be made to depend the State's deposit or JNOV award based on State statutory provisions); **Kirby Forest Industries Inc. v. United States (1984) 467 US 1, 17 (Kirby)** (State and federal statutory provisions have been

v. Sindermann, 408 U.S. 593, 597 (1972) (government cannot condition the receipt of a government benefit on waiver of a constitutionally protected right); Speiser v. Randall, 357 U.S. 513, 529 (1958), (veterans' tax benefit may not be conditioned on taking a loyalty oath) and Frost Trucking, 271 U.S. at 594 ("it is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.")

invalidated when necessary to ensure just compensation to the owner); **Testa v. Katt, 330 US 386 (1947)** (State courts must not decide merely according to the laws and Constitution of the State, but according to the "supreme law of the land"); **Cooper v. Aaron, 358 US 1 (1958)** (They are bound to give effect to the Federal laws and to disregard State law when there is a conflict};. **Howlett v Rose, 496 US 356 (1990)** (It violates the Supremacy Clause for a State court to refuse to hear a category of Federal claims when the court entertains State law actions of a similar nature).

This Court has previously articulated the basic principle that a legislature cannot eliminate a citizen's constitutional right and replace it with a statutory right. **Cooper,** 358 U.S. at 18-19 ("It is necessary only to recall some basic constitutional propositions which are settled doctrine" which includes that the Constitution is the supreme law of the land.). This principle equally applies to other constitutional rights such as the right to free speech, equal protection, the right to due process, the right to privacy, etc. The courts below ignored this fundamental principle solely to accomplish their desired policy result. The state's attempt to strip a property of all constitutional rights, and replace those rights with statutory rights - which can be modified at the whim of the legislature and lack any protections, without just compensation, due process and equal treatment is patently unconstitutional. *See* **Ochoa v. Hernandez y Morales, 230 U.S. 139, 161 (1913)** ("Whatever else may be uncertain about the definition of the term 'process of law,' all authorities agree that it inhibits the taking of one man's property . . . . . contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."). Such an

attempt is unconstitutional and a violation of the state and federal constitutions. **Cooper, 358 U.S. 1**.

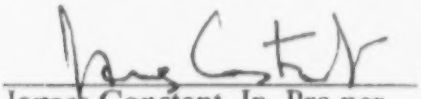
The foregoing reply is similar to the argument in the petition of case **Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection,** *et al.* Docket No. 08-1151, as to the second question presented.

CONCLUSION

The appeal court's opinion is a product of reading California's quick action law as "law of the land" and as "statutory constitution" replacing the federal Constitution. The State's opposition speaks to the appeal court's opinion not to the constitutional questions presented in the petition. The facts and examples of conflict between California's quick action laws and the federal laws and Constitution, as set forth in the petition, are uncontroverted by the State's opposition brief. The pre deprivation no discovery, no valuation and payment offer, and the pay to play, take now and pay later, and waive to play characteristics of California's quick action laws are repugnant to the notions of just compensation, equal treatment, due process, fairness and justice.

This case is the ideal vehicle for this Court to finally rein in state courts that continue to invoke quick action laws to avoid federal law and Constitution by simply declaring that California's quick action laws are approved by *California law precedents*, *See* App. in Pet. for Cert. at page 41 last paragraph and page 42 last paragraph; *See* petitioner's Objections to Appeal Court's Opinion in Pet. for Cert. at pages 14-16. Accordingly, this Court should grant certiorari.

Dated: 3 November, 2009 Respectfully submitted

By: 

James Constant, In Pro per
1603 Danbury Dr
Claremont, CA 91711

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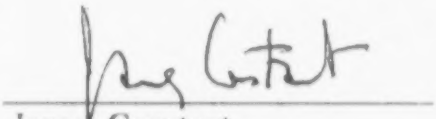
By: 

James Constant